

Case Sequence:

Valuing a Professional License or Degree as Marital Property

[Lesman v. Lesman](#), 88 A.D.2d 153, 452 N.Y.S.2d 935 (1982).

[O'Brien v. O'Brien](#), 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985).

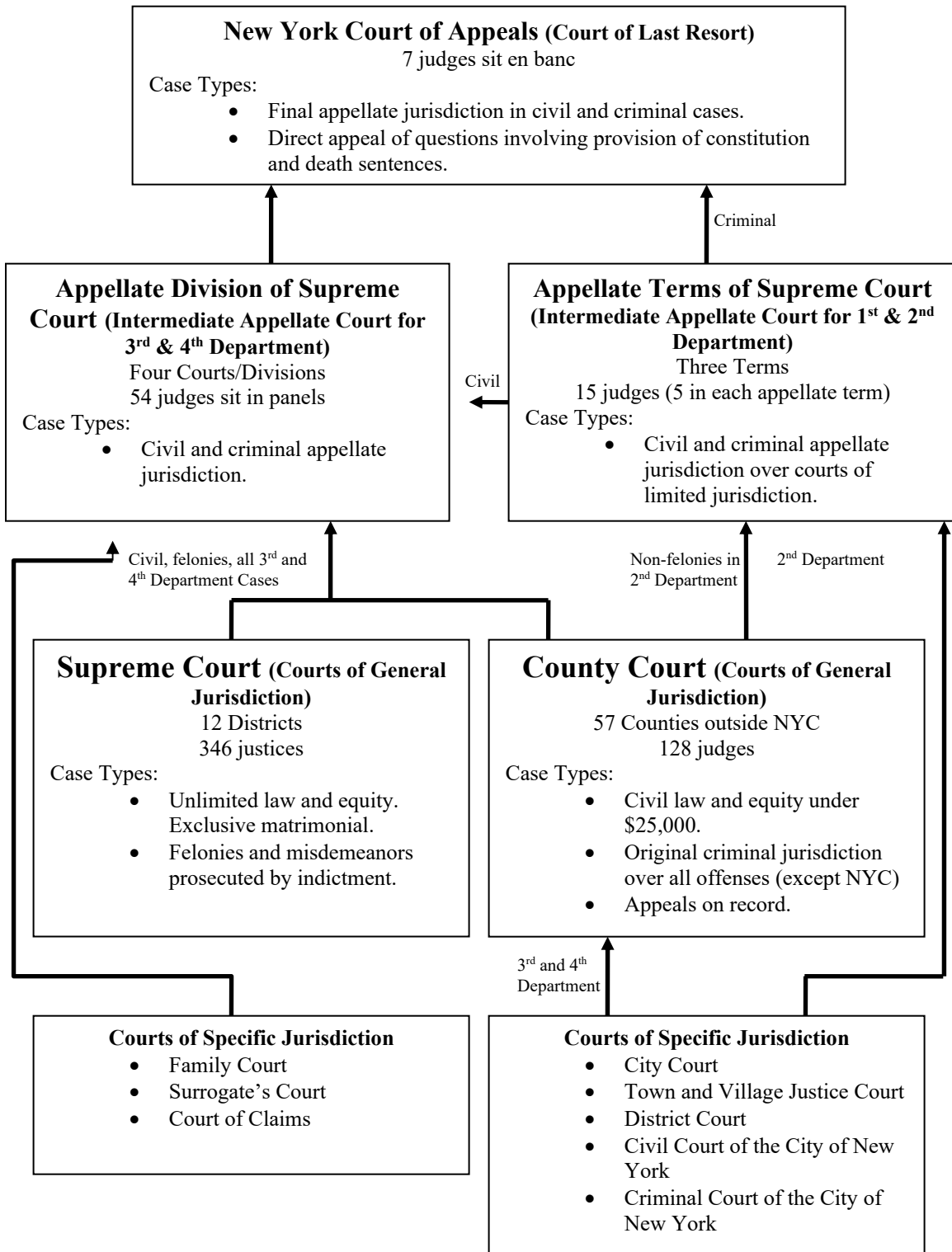
[Marcus v. Marcus](#), 135 A.D.2d 216, 525 N.Y.S.2d 238 (1988).

[McGowan v. McGowan](#), 142 A.D.2d 355, 535 N.Y.S.2d 990 (1988).

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New York State Court Chart



Lesman v. Lesman

Supreme Court of New York, Appellate Division, Fourth Department

July 9, 1982

No Number in Original

Reporter

88 A.D.2d 153 *; 452 N.Y.S.2d 935 **; 1982 N.Y. App. Div. LEXIS 16597 **

Judges: Boomer, J. Dillon, P. J., Hancock, Jr., Denman and Moule, JJ., concur.

Opinion by: BOOMER

Opinion

[**936] [***3] The principal issue on these cross appeals from a judgment of divorce is whether a license to practice medicine or a medical degree, earned during the marriage, is [*154] marital property within the meaning of the equitable distribution law (*Domestic Relations Law*, § 236, part B). The trial court granted judgment to the wife on the grounds of cruel and inhuman treatment, but denied her application for an award in lieu of equitable distribution of the husband's medical license, holding that the license was not an item subject to equitable distribution. We agree with the trial court and we affirm the judgment in that respect.

The parties were married in Brooklyn, New York, on August 8, 1971, and two days later they went to Guadalajara, Mexico, where the husband attended medical school. During their three and one-half year stay in Mexico, the wife did not work because, she said, Mexican law did not allow her to do so. The full cost of tuition, books, and other school expenses for the husband's medical education was approximately \$ 25,000 to \$ 30,000. This was paid for by the husband from his savings, a New York State higher education loan and other personal loans. In 1972 [***4] or 1973, the wife [**937] went to New York for a period of five months where she worked and earned \$ 25 per week. There is no indication that she contributed any of this amount to her husband.

After the husband completed medical school in January, 1975, the parties returned to New York where the husband worked for one year as a nonsalaried medical clerk. During this time and until her first child was born in May of 1976, the wife worked as a computer operator earning a gross wage of \$ 115 per week. She has not worked since. After he served his clerkship, the husband was employed at Elmhurst City Hospital where he completed one year of internship and two years of residency. He supported his family from his earnings as an intern and resident. After the husband completed his residency in June of 1979, the parties went to Buffalo so the husband could accept a

fellowship in gastroenterology. The parties separated in December, 1979.

At the time of the trial in July, 1981, the husband had signed a contract to start work as a staff physician at a hospital in New York City at a salary of \$ 45,000 a year with the possibility of earning some extra income from [*155] private [***5] practice. His highest gross income for any year during the marriage was \$ 21,000. At the time of the trial the wife was attending a training program operated by CETA which would qualify her as a medical receptionist. During her training she was receiving \$ 192 every two weeks. The program was scheduled to end in January, 1982, but after that she intended to take more courses leading to employment as a medical assistant. These courses will last until June or September, 1982, and will not be paid for by CETA.

Two children were born of this marriage, one in May, 1976, and one in January, 1979.

In addition to granting a divorce to the wife, the trial court granted her custody of the children and awarded her \$ 200 a week for maintenance and \$ 100 a week for child support. The wife appeals from the trial court's denial of her application for an award in lieu of equitable distribution of her husband's license to practice medicine which she claims is marital property.

The question whether an advanced education or a professional license earned during the marriage is property subject to distribution upon divorce is one of first impression in the appellate courts of this State.¹ Appellate [***6] courts in other States, however, have

¹ Recently the Supreme Court of Westchester County held that a medical education is property subject to equitable distribution (*O'Brien v O'Brien*, 114 Misc 2d 233).

passed upon the issue.² The majority view is that these items are not property and that a wife who contributes to her husband's professional education may not, upon divorce, receive an award for her contributions (*Matter of Wisner v Wisner*, 129 Ariz 333; *Todd v Todd*, 272 Cal App 2d 786; *Matter of Aufmuth*, 89 Cal App 3d 446; *Matter of Graham v Graham*, 194 Col 429; *Matter of Goldstein*, 97 Ill App 3d 1023; *Wilcox v Wilcox*, 173 Ind App 661; *Matter of McManama*, Ind , 399 NE2d 371; *Leveck v Leveck*, 614 SW2d 710 [Ky]; *Stern v Stern*, 66 NJ 340; *Mahoney v Mahoney*, 182 NJ Super 598; *Muckleroy v Muckleroy*, 84 NM 14; *Nastrom v Nastrom*, 262 NW2d 487 [ND]; *Frausto v Frausto*, 611 SW2d 656 [Tex]; *DeWitt v DeWitt*, 98 Wis 2d 44).

[**7] [*156] Four cases treat the license or its potential for increase in earning capacity as property (*Matter of Horstmann*, 263 NW2d 885 [Iowa]; *Matter of Sullivan*, Cal App 3d [decided Jan. 8, 1982]; *Inman v Inman*, 578 SW2d 266 [Ky]; *Daniels v Daniels*, 20 Ohio Opns 2d 458). The Iowa and California cases seem to give the contributing spouse a share in the value of the education (*Matter of Horstmann*, *supra*, p 891; *Matter of Sullivan*, *supra*), while the Kentucky [**938] case limits the recovery to "his or her monetary investment in the degree". (*Inman v Inman*, *supra*, p 269.) The Ohio case holds that the license can be considered in awarding alimony (*Daniels v Daniels*, *supra*, p 459).

The Kentucky Court of Appeals applies the property concept only under limited circumstances. It holds that a professional education or degree is property only when it is necessary to treat it as such to do equity to the contributing spouse, that is, where the marriage dissolves shortly after the degree is attained, there is no property to distribute and the contributing spouse does not qualify for alimony (*Inman v Inman*, *supra*).³ Where, however, [**8] the parties live together for several years after the graduation and the contributing spouse qualifies for maintenance, then the license or degree is not treated as property (*Leveck v Leveck*, 614 SW2d 710, *supra*).

Other appellate courts, while deciding that an advanced degree or professional license is not property, nevertheless hold that the spouse contributing to the education of the other is entitled, on equitable principles, to restitution of

the amounts expended (*DeLa Rosa v DeLa Rosa*, *Minn* , 309 NW2d 755; [**9] *Hubbard v Hubbard*, 603 P2d 747 [Okla]). One court, under the guise of granting alimony, awarded the wife a lump-sum of \$ 15,000 which "fairly [represented] the wife's contribution to the acquisition of [the husband's medical degree] acquired during coveture." Normally, this award of alimony would have been improper [*157] since the wife was self-supporting and was earning more than the husband (*Moss v Moss*, 80 Mich App 693, 695).

Most of the arguments against categorizing professional education as property are recited in the recent New Jersey case of *Mahoney v Mahoney* (182 NJ Super 598, *supra*), and in the cases it cites. We find those arguments persuasive.

A professional education, degree or license does not fall within the traditional concepts of property. "It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed, or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by the mere [**10] expenditure of money. It is simply an intellectual achievement that may potentially assist in the future acquisition of property. In our view, it has none of the attributes of property in the usual sense of that term." (*Matter of Graham v Graham*, 194 Col 429, 432, *supra*.)

By classifying an education or degree as property, the courts, in reality, treat as property the future enhanced earning capacity that may result from the education. Enhanced earning capacity is not property. It is not vested; it is only an uncertain expectancy, for it is dependent upon the future success and efforts of the degree holder.

Gross inequities may result from predicating distribution awards upon the speculative expectation of enhanced future earnings, since distributive awards, unlike maintenance, once fixed may not be modified to meet future realities. It is almost impossible to predict what amount of enhanced earnings, if any, will result from a professional education. The degree of financial success attained by those holding a professional degree varies greatly. Some, even, may earn less from their professional practices than they could have earned from [**939] nonprofessional work. [**11] Moreover, others, due to choice or factors beyond their control, may never practice their professions.

The property concept does not fit the situation where the parties have lived together for some period of time after [*158] graduation. In the typical case the wife works and contributes her income to enable the husband to continue his schooling and earn his professional degree. In making this contribution the wife expects that she will benefit from

² See Ann., 4 ALR4th 1294.

³ In *Inman* (*supra*, p 268), the court had "strong reservations about placing a professional license in the category of marital property. Doing so can only create another field for battle in the already complex and delicate area of division of marital property. In spite of these reservations, however, we feel that there are certain instances in which treating a professional license as marital property is the only way in which a court can achieve an equitable result."

the increased income her husband will earn from the practice of his profession. Since this expectation is aborted when the parties are divorced shortly after the husband graduates, some courts apply the property concept to restore to the wife the amount she has invested. However, where the parties live together for a number of years after the husband enters his profession, the wife's expectation is realized, in part at least, and by participating in her husband's income, she receives a return which may exceed the amount of her contributions to his education. It is also probable that at the time of the divorce, as the result of the husband's enhanced earnings, the parties will have accumulated marital property in which the divorced [***12] wife will share and thereby receive a return on her investment. Under these circumstances, the Kentucky court would hold that the degree or license is not property. If we were to characterize education as property under some circumstances and not under others, we would create the "doctrinal chaos" referred to by the New Jersey court in *Mahoney v Mahoney* (182 NJ Super 598, 608, *supra*): "[The] concept of property cannot, as a matter of rationality or common sense, be defined by a purely circumstantial criterion. If a license or degree or its enhanced earning potential is not property five or ten or twenty years after graduation, it cannot be property on graduation day either * * * The simple fact remains that the marital property label does not suit at all and, therefore, cannot be made to suit some of the time."

We are not persuaded by the minority view that the courts should broaden the concept of property to embrace professional education, degrees or licenses. This does not end our inquiry, however, for we must consider whether we may provide a remedy for the wife in this case under some equitable theory.

Here, the wife contributed no money to the husband's education, [***13] although she did provide the usual spousal services while he attended school and she did contribute [*159] her earnings to the parties' support for a period of one and one-half years after the husband graduated from medical school. She has, however, been awarded substantial maintenance which will be paid out of the husband's enhanced professional earnings and thus her contributions toward her husband's education will not go unrewarded. There is no need here for the court to fashion an equitable remedy.

We would not be inclined to fashion such a remedy in any event. It is the hard case, typified by the sacrificing wife who is deserted by her ungrateful husband shortly after he achieves his educational goal, that led some of the courts to fashion an equitable remedy to restore to the wife the contributions she had made. Even in such cases, the equitable remedies of unjust enrichment and restitution do not fit. Marriage, as the cases supporting the majority rule point out, is more than an economic undertaking. The parties agree upon the manner in which they will provide financial support and nonfinancial services to each other,

and they do not place values on their respective [***14] contributions, nor do they expect to pay each other for those contributions. Every unsuccessful marriage results in the disappointment of expectations, financial as well as nonfinancial, but it does not result in a financial loss in a commercial sense. The wife, by contributing to her husband's education, follows a plan agreed upon for the joint benefit of both spouses. "If the plan fails by reason of the termination of the marriage, we do not regard the supporting spouse's consequent loss of expectations by itself as any more compensable or demanding [**940] of solicitude than the loss of expectations of any other spouse who, in the hope and anticipation of the endurance of the relationship and its commitments, has invested a portion of his or her life, youth, energy and labor in a failed marriage." (*Mahoney v Mahoney*, 182 NJ Super 598, 614, *supra*.)

The Legislature, not the courts, has provided for the terms and consequences of divorce. It may not have been equitable, when granting a divorce, to have permitted property acquired during the marriage to remain with the spouse who held legal title, but the courts did not feel free to provide for equitable distribution [***15] of marital property. That was a matter for the Legislature. The Legislature has [*160] now provided for equitable distribution of "property". It has not provided for equitable distribution of future earnings and we should not do so, either by distorting the concept of property or by applying our own notions of equity. In most cases the courts can accomplish equity by awarding maintenance to a wife who requires it, ⁴ or by granting her an equitable share of whatever marital property has accumulated. In fixing the amount of maintenance, and in distributing the marital property, the courts must consider the contributions made by the wife to the husband's "career or career potential" (*Domestic Relations Law*, § 236, part B, subd 5, par d, cl [6]; subd 6, par a, cl [8]).

[***16] If the wife does not qualify for maintenance, it will be because she has ample resources to support herself. Here, we have been discussing the typical case where the wife contributes to the husband's education. If a wealthy husband were to finance his wife's education, would we feel compelled to grant restitution to him in the event of a divorce? Where it is the wife who makes the contribution, should restitution be ordered even where she has ample means? If a perceived inequity requires a remedy in these cases, the Legislature, not the courts, should provide it. ⁵

⁴ See *Hill v Hill* (182 NJ Super 616) where the court held that the wife who contributed to the husband's medical education was entitled to rehabilitative alimony so she could complete her education. The amount of the alimony was not to depend, however, upon the amount of her contributions or upon whether she made any contributions at all.

⁵ Indiana has enacted legislation permitting the courts to

[***17] The husband appeals from the awards for maintenance and child support. Based on the record, the Trial Justice properly exercised his discretion in awarding the wife the weekly sums of \$ 200 for maintenance and \$ 100 for child support and we affirm the awards.

The husband also appeals from the provision of the judgment concerning the duration of maintenance. That [*161] provision states that "plaintiff shall pay to the defendant the sum of two hundred (\$ 200.00) dollars per week as and for maintenance until such time as the parties' youngest child reaches her majority, or until the defendant remarries". This provision is reasonable. The marriage lasted eight years and produced two children. Even though she may become employed, the wife may require some maintenance as long as she is caring for the children. If at any earlier time the circumstances no longer justify the continuance of maintenance, the husband may move to modify the judgment to terminate the maintenance payments.

We determine, however, that other provisions of the judgment, relating to future modification of maintenance and support payments, are unauthorized and must be deleted. Either party may seek a modification [***18] of the judgment of divorce based upon a "substantial change in circumstance" (*Domestic Relations Law, § 236, part B, subd 9, par b*). Any question about a modification of the amount of maintenance or child support can best be determined in [**941] the future to meet the changed conditions (*Golden v Golden, 37 AD2d 578*). Finally, we see no reason to disturb the award to the wife for counsel fees.

Accordingly, the judgment should be modified by deleting from the fifth adjudging paragraph the sentence in parentheses, and by deleting the sixth, seventh and eighth adjudging paragraphs, and, as modified, affirmed.

Judgment unanimously modified, on the law and facts, and, as modified affirmed, without costs, in accordance with opinion by Boomer, J.

reimburse the spouse who contributed to the other's education. "When the court finds there is little or no marital property, it may award either spouse a money judgment not limited to the existing property. However, this award may be made only for the financial contribution of one spouse toward tuition, books, and laboratory fees for the higher education of the other spouse." (Ind Code, § 31-1-11.5-11, subd [c].)

O'Brien v. O'Brien

Court of Appeals of New York

November 11, 1985, Argued ; December 26, 1985, Decided

No Number in Original

Reporter

66 N.Y.2d 576 *; 489 N.E.2d 712 **; 498 N.Y.S.2d 743 ***; 1985 N.Y. LEXIS 17941 *

Judges: Chief Judge Wachtler and Judges Jasen, Meyer, Kaye, Alexander and Titone concur with Judge Simons; Judges Meyer and Titone concur in separate concurring opinions.

Opinion by: SIMONS

Opinion

In this divorce action, the parties' only asset of any consequence is the husband's newly acquired license to practice medicine. The principal issue presented is whether that license, acquired during their marriage, is marital property subject to equitable distribution under Domestic Relations Law § 236 (B) (5). Supreme Court held that it was and accordingly made a distributive award in defendant's favor. * It also granted defendant maintenance arrears, expert witness fees and attorneys' fees (114 Misc 2d 233). On appeal to the Appellate Division, a majority of that court held that plaintiff's [****11] medical license is not marital property and that defendant was not entitled to an award for the expert witness fees. It modified the judgment and remitted the case to Supreme Court for further proceedings, specifically for a determination of maintenance and a rehabilitative award (106 AD2d 223). The matter is before us by leave of the Appellate Division.

We now hold that plaintiff's medical license constitutes [*581] "marital property" within the meaning of Domestic Relations Law § 236 (B) (1) (c) and that it is therefore subject to equitable distribution pursuant to subdivision 5 of that part. That being so, the Appellate Division erred in denying a fee, as a matter of law, to defendant's expert witness who evaluated the license.

I

Plaintiff and defendant [****12] married on April 3, 1971. At the time both were employed as teachers at the same private school. Defendant had a bachelor's degree

*The action was originally instituted by plaintiff husband and defendant wife asserted a counterclaim in her answer. Subsequently, the husband withdrew his complaint and reply to the counterclaim and the wife received an uncontested divorce.

and a temporary teaching certificate but required 18 months of postgraduate classes at an approximate cost of \$ 3,000, excluding living expenses, to obtain permanent certification in New York. She claimed, and the trial court found, that she had relinquished [***745] the opportunity to obtain permanent certification [**714] while plaintiff pursued his education. At the time of the marriage, plaintiff had completed only three and one-half years of college but shortly afterward he returned to school at night to earn his bachelor's degree and to complete sufficient premedical courses to enter medical school. In September 1973 the parties moved to Guadalajara, Mexico, where plaintiff became a full-time medical student. While he pursued his studies defendant held several teaching and tutorial positions and contributed her earnings to their joint expenses. The parties returned to New York in December 1976 so that plaintiff could complete the last two semesters of medical school and internship training here. After they returned, defendant resumed [****13] her former teaching position and she remained in it at the time this action was commenced. Plaintiff was licensed to practice medicine in October 1980. He commenced this action for divorce two months later. At the time of trial, he was a resident in general surgery.

During the marriage both parties contributed to paying the living and educational expenses and they received additional help from both of their families. They disagreed on the amounts of their respective contributions but it is undisputed that in addition to performing household work and managing the family finances defendant was gainfully employed throughout the marriage, that she contributed all of her earnings to their living and educational expenses and that her financial contributions exceeded those of plaintiff. The trial court found that she had contributed 76% of the parties' [*582] income exclusive of a \$ 10,000

student loan obtained by defendant. Finding that plaintiff's medical degree and license are marital property, the court received evidence of its value and ordered a distributive award to defendant.

Defendant presented expert testimony that the present value of plaintiff's medical license was [****14] \$ 472,000. Her expert testified that he arrived at this figure by comparing the average income of a college graduate and that of a general surgeon between 1985, when plaintiff's residency would end, and 2012, when he would reach age 65. After considering Federal income taxes, an inflation rate of 10% and a real interest rate of 3% he capitalized the difference in average earnings and reduced the amount to present value. He also gave his opinion that the present value of defendant's contribution to plaintiff's medical education was \$ 103,390. Plaintiff offered no expert testimony on the subject.

The court, after considering the life-style that plaintiff would enjoy from the enhanced earning potential his medical license would bring and defendant's contributions and efforts toward attainment of it, made a distributive award to her of \$ 188,800, representing 40% of the value of the license, and ordered it paid in 11 annual installments of various amounts beginning November 1, 1982 and ending November 1, 1992. The court also directed plaintiff to maintain a life insurance policy on his life for defendant's benefit for the unpaid balance of the award and it ordered plaintiff to pay [****15] defendant's counsel fees of \$ 7,000 and her expert witness fee of \$ 1,000. It did not award defendant maintenance.

A divided Appellate Division, relying on its prior decision in *Conner v Conner* (97 AD2d 88) and the decision of the Fourth Department in *Lesman v Lesman* (88 AD2d 153, appeal dismissed 57 NY2d 956), concluded that a professional license acquired during marriage is not marital property subject to distribution. It therefore modified the judgment by striking the trial court's determination that it is and by striking the provision ordering payment of the expert witness for evaluating the license and remitted the case for further proceedings.

On these cross appeals, defendant seeks reinstatement of the judgment of the trial court. Plaintiff contends that the Appellate Division correctly held that a professional license is not marital property but he also urges that the trial court failed to adequately explain what factors it relied on [***746] in making its decision, that it erroneously [**715] excluded evidence of [*583] defendant's marital fault and that the trial court's awards for attorneys and expert witness fees were improper.

II

The [****16] Equitable Distribution Law contemplates only two classes of property: marital property and separate property (Domestic Relations Law § 236 [B] [c], [d]). The former, which is subject to equitable distribution, is defined broadly as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, *regardless of the form in which title is held*" (Domestic Relations Law § 236 [B] [1] [c] [emphasis added]; *see*, § 236 [B] [5] [b], [c]). Plaintiff does not contend that his license is excluded from distribution because it is separate property; rather, he claims that it is not property at all but represents a personal attainment in acquiring knowledge. He rests his argument on decisions in similar cases from other jurisdictions and on his view that a license does not satisfy common-law concepts of property. Neither contention is controlling because decisions in other States rely principally on their own statutes, and the legislative history underlying them, and because the New York Legislature deliberately went beyond traditional property concepts when [****17] it formulated the Equitable Distribution Law (*see generally*, 2 Foster-Freed-Brandes, Law and the Family -- New York ch 33, at 917 *et set.* [1985 Cum Supp]). Instead, our statute recognizes that spouses have an equitable claim to things of value arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition. Those things acquired during marriage and subject to distribution have been classified as "marital property" although, as one commentator has observed, they hardly fall within the traditional property concepts because there is no common-law property interest remotely resembling marital property. "It is a statutory creature, is of no meaning whatsoever during the normal course of a marriage and arises full-grown, like Athena, upon the signing of a separation agreement or the commencement of a matrimonial action. [Thus] [it] is hardly surprising, and not at all relevant, that traditional common law property concepts do not fit in parsing the meaning of 'marital property'" (Florescue, "Market Value", *Professional Licenses and Marital Property: A Dilemma in Search* [****18] *of a Horn*, 1982 NY St Bar Assn Fam L [*584] Rev 13 [Dec.]). Having classified the "property" subject to distribution, the Legislature did not attempt to go further and define it but left it to the courts to determine what interests come within the terms of section 236 (B) (1) (c).

We made such a determination in *Majauskas v Majauskas* (61 NY2d 481), holding there that vested but unmaturing pension rights are marital property subject to equitable

distribution. Because pension benefits are not specifically identified as marital property in the statute, we looked to the express reference to pension rights contained in section 236 (B) (5) (d) (4), which deals with equitable distribution of marital property, to other provisions of the equitable distribution statute and to the legislative intent behind its enactment to determine whether pension rights are marital property or separate property. A similar analysis is appropriate here and leads to the conclusion that marital property encompasses a license to practice medicine to the extent that the license is acquired during marriage.

Section 236 provides that in making an equitable distribution of marital property, "the court [****19] shall consider: * * * (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and *to the career or career potential* of the other party [and] * * * (9) [***747] the impossibility or difficulty of evaluating [**716] any component asset or any interest in a business, corporation or *profession*" (Domestic Relations Law § 236 [B] [5] [d] [6], [9] [emphasis added]). Where equitable distribution of marital property is appropriate but "the distribution of an interest in a business, corporation or *profession* would be contrary to law" the court shall make a distributive award in lieu of an actual distribution of the property (Domestic Relations Law § 236 [B] [5] [e] [emphasis added]). The words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-titleholding spouse, including financial contributions and [****20] nonfinancial contributions made by caring for the home and family.

The history which preceded enactment of the statute confirms this interpretation. Reform of section 236 was advocated because experience had proven that application of the traditional [*585] common-law title theory of property had caused inequities upon dissolution of a marriage. The Legislature replaced the existing system with equitable distribution of marital property, an entirely new theory which considered all the circumstances of the case and of the respective parties to the marriage (Assembly Memorandum, 1980 NY Legis Ann, at 129-130). Equitable distribution was based on the premise that a marriage is, among other things, an economic partnership to which both parties contribute as spouse, parent, wage earner or homemaker (*id.*, at 130; *see*, Governor's Memorandum of Approval, 1980 McKinney's Session Laws of NY, at 1863). Consistent with this purpose, and implicit in the statutory scheme as a whole, is the view that

upon dissolution of the marriage there should be a winding up of the parties' economic affairs and a severance of their economic ties by an equitable distribution of the marital assets. [****21] Thus, the concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow "the recipient spouse an opportunity to achieve [economic] independence" (Assembly Memorandum, 1980 NY Legis Ann, at 130).

The determination that a professional license is marital property is also consistent with the conceptual base upon which the statute rests. As this case demonstrates, few undertakings during a marriage better qualify as the type of joint effort that the statute's economic partnership theory is intended to address than contributions toward one spouse's acquisition of a professional license. Working spouses are often required to contribute substantial income as wage earners, sacrifice their own educational or career goals and opportunities for child rearing, perform the bulk of household duties and responsibilities and forego the acquisition of marital assets that could have been accumulated if the professional spouse had been employed rather than occupied with the study and training necessary to acquire a professional license. In this [****22] case, nearly all of the parties' nine-year marriage was devoted to the acquisition of plaintiff's medical license and defendant played a major role in that project. She worked continuously during the marriage and contributed all of her earnings to their joint effort, she sacrificed her own educational and career opportunities, and she traveled with plaintiff to Mexico for three and one-half years while he attended medical school there. The Legislature has decided, by its [*586] explicit reference in the statute to the contributions of one spouse to the other's profession or career (*see*, Domestic Relations Law § 236 [B] [5] [d] [6], [9]; [e]), that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property.

The majority at the Appellate Division held that the cited statutory provisions do not refer to the license held by a professional who has yet to establish a practice but only to a going professional practice (*see, e.g., Arvantides v Arvantides*, 64 NY2d 1033; [**717] [****748] *Litman v Litman*, 61 NY2d [****23] 918). There is no reason in law or logic to restrict the plain language of the statute to existing practices, however, for it is of little consequence in making an award of marital property, except for the purpose of evaluation, whether the professional spouse has already established a practice or whether he or she has yet to do so. An established practice merely represents the

exercise of the privileges conferred upon the professional spouse by the license and the income flowing from that practice represents the receipt of the enhanced earning capacity that licensure allows. That being so, it would be unfair not to consider the license a marital asset.

Plaintiff's principal argument, adopted by the majority below, is that a professional license is not marital property because it does not fit within the traditional view of property as something which has an exchange value on the open market and is capable of sale, assignment or transfer. The position does not withstand analysis for at least two reasons. First, as we have observed, it ignores the fact that whether a professional license constitutes marital property is to be judged by the language of the statute which created this [****24] new species of property previously unknown at common law or under prior statutes. Thus, whether the license fits within traditional property concepts is of no consequence. Second, it is an overstatement to assert that a professional license could not be considered property even outside the context of section 236 (B). A professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder, which may not be revoked without due process of law (*see, Matter of Bender v Board of Regents*, 262 App Div 627, 631; *People ex rel. Greenberg v Reid*, 151 App Div 324, 326). That a professional license has no market value is irrelevant. Obviously, a license may [*587] not be alienated as may other property and for that reason the working spouse's interest in it is limited. The Legislature has recognized that limitation, however, and has provided for an award in lieu of its actual distribution (*see, Domestic Relations Law § 236 [B] [5] [e]*).

Plaintiff also contends that alternative remedies should be employed, such as an award of rehabilitative [****25] maintenance or reimbursement for direct financial contributions (*see, e.g., Kutanovski v Kutanovski*, 109 AD2d 822, 824; *Conner v Conner*, 97 AD2d 88, 101, *supra*; *Lesman v Lesman*, 88 AD2d 153, 158-159, *supra*). The statute does not expressly authorize retrospective maintenance or rehabilitative awards and we have no occasion to decide in this case whether the authority to do so may ever be implied from its provisions (*but see, Cappiello v Cappiello*, 66 NY2d 107). It is sufficient to observe that normally a working spouse should not be restricted to that relief because to do so frustrates the purposes underlying the Equitable Distribution Law. Limiting a working spouse to a maintenance award, either general or rehabilitative, not only is contrary to the economic partnership concept underlying the statute but also retains the uncertain and inequitable economic ties of

dependence that the Legislature sought to extinguish by equitable distribution. Maintenance is subject to termination upon the recipient's remarriage and a working spouse may never receive adequate consideration for his or her contribution and may even be penalized for the decision to remarry if that [****26] is the only method of compensating the contribution. As one court said so well, "[the] function of equitable distribution is to recognize that when a marriage ends, each of the spouses, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity" (*Wood v [****749] Wood*, 119 Misc 2d 1076, 1079). [**718] The Legislature stated its intention to eliminate such inequities by providing that a supporting spouse's "direct or indirect contribution" be recognized, considered and rewarded (*Domestic Relations Law § 236 [B] [5] [d] [6]*).

Turning to the question of valuation, it has been suggested that even if a professional license is considered marital property, the working spouse is entitled only to reimbursement of his or her direct financial contributions (*see, Note, Equitable Distribution of Degrees and Licenses: Two Theories Toward [*588] Compensating Spousal Contributions*, 49 Brooklyn L Rev 301, 317-322). By parity of reasoning, a spouse's [****27] down payment on real estate or contribution to the purchase of securities would be limited to the money contributed, without any remuneration for any incremental value in the asset because of price appreciation. Such a result is completely at odds with the statute's requirement that the court give full consideration to both direct and indirect contributions "made to the acquisition of such marital property by the party not having title, including joint *efforts* or expenditures and *contributions and services as a spouse, parent, wage earner and homemaker*" (*Domestic Relations Law § 236 [B] [5] [d] [6] [emphasis added]*). If the license is marital property, then the working spouse is entitled to an equitable portion of it, not a return of funds advanced. Its value is the enhanced earning capacity it affords the holder and although fixing the present value of that enhanced earning capacity may present problems, the problems are not insurmountable. Certainly they are no more difficult than computing tort damages for wrongful death or diminished earning capacity resulting from injury and they differ only in degree from the problems presented when valuing a professional [****28] practice for purposes of a distributive award, something the courts have not hesitated to do (*see, Arvantides v Arvantides*, 64 NY2d 1033, *supra*; *Litman v Litman*, 93 AD2d 695, *affd* 61 NY2d 918, *supra*; *Billington v Billington*, 111 AD2d 203; *Cohen v Cohen*, 104 AD2d 841, *appeal dismissed* 64

NY2d 773; *Nehorayoff v Nehorayoff*, 108 Misc 2d 311). The trial court retains the flexibility and discretion to structure the distributive award equitably, taking into consideration factors such as the working spouse's need for immediate payment, the licensed spouse's current ability to pay and the income tax consequences of prolonging the period of payment (*see*, Internal Revenue Code [26 USC] § 71 [a] [1]; [c] [2]; Treas Reg [26 CFR] § 1.71-1 [d] [4]) and, once it has received evidence of the present value of the license and the working spouse's contributions toward its acquisition and considered the remaining factors mandated by the statute (*see*, Domestic Relations Law § 236 [B] [5] [d] [1]-[10]), it may then make an appropriate distribution of the marital property including a distributive award for the professional license if such an [****29] award is warranted. When other marital assets are of sufficient value to provide for the supporting spouse's equitable portion of the marital property, including his or her contributions to the acquisition of the professional license, [*589] however, the court retains the discretion to distribute these other marital assets or to make a distributive award in lieu of an actual distribution of the value of the professional spouse's license (*see*, *Majauskas v Majauskas*, 61 NY2d 481, 493, *supra*).

III

Three additional issues remain for our consideration.

First, plaintiff notes that the statute requires the trial court to state the factors it considered and the basis for its decision in making distribution and that neither the parties nor counsel may waive that requirement (*see*, Domestic Relations Law § 236 [B] [5] [g]). He contends that the [***750] court failed to adequately do so in this [**719] case. We have held recently that while section 236 (B) (5) (g) does not require the court to analyze each of the factors stated in subdivision (5) (d) and give reasons as to each, it still must set forth all the factors it considered and the reason for its [****30] decision (*Cappiello v Cappiello*, 66 NY2d 107, *supra*). Unless the trial judge reveals not only the factors he considered, but also his reasoning for the award made, intelligent review of the broad discretion entrusted to him is not possible.

The evidence before the trial court in this case supported its factual findings but its decision does not indicate what factors it considered, or the weight it attributed to them, in making the distributive award to defendant. Nevertheless, the Appellate Division has the same authority to make an award of marital property as does the trial court (*see*, *Majauskas v Majauskas*, 61 NY2d 481, *supra*), and it may effectuate the award and set forth the factors it considers determinative and the reasons for its decision or it may

remit the matter to Special Term for that purpose if it is unable to do so (*see*, *Kobylack v Kobylack*, 62 NY2d 399).

Plaintiff also contends that the trial court erred in excluding evidence of defendant's marital fault on the question of equitable distribution. Arguably, the court may consider marital fault under factor 10, "any other factor which the court shall expressly find to be just and proper" (Domestic [****31] Relations Law § 236 [B] [5] [d] [10]; *see*, Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:13, pp 205-206 [1977-1984 Supp Pamphlet]). Except in egregious cases which shock the conscience of the court, however, it is not a "just and proper" [*590] factor for consideration in the equitable distribution of marital property (*Blickstein v Blickstein*, 99 AD2d 287, 292, *appeal dismissed* 62 NY2d 802; *see*, *Stevens v Stevens*, 107 AD2d 987; *Pacifico v Pacifico*, 101 AD2d 709; *McMahan v McMahan*, 100 AD2d 826). That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues (*see*, *Blickstein v Blickstein*, *supra*, at p 292; *McMahan v McMahan*, *supra*, at p 827). We have no occasion to consider the wife's fault in this action because there is no suggestion that she was [****32] guilty of fault sufficient to shock the conscience.

Finally, plaintiff contends that the trial court erred in allowing defendant an award of counsel fees and defendant contends the Appellate Division erred in deleting the trial court's award of expert witness fees. The decision to award either expert witness fees or attorney's fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as the trial court's is (*see*, Domestic Relations Law § 237 [a], [c]; *Majauskas v Majauskas*, 61 NY2d 481, 493-494, *supra*). Because the Appellate Division's affirmance of the award of counsel fees cannot be characterized as an abuse of discretion as a matter of law, the issue is beyond our review (*see*, *Majauskas v Majauskas*, *supra*, at p 494; *Patron v Patron*, 40 NY2d 582). Its decision to delete the award of expert fees, as a matter of law, was apparently based on the fact that the expert's testimony was directed solely to the value of plaintiff's license, evidence that was unnecessary in view of its determination that the license was not marital property. We have concluded that the license [****33] is marital [***751] property, however, and on remand the [**720] court may exercise its discretion to determine whether an award of expert fees is

warranted and if so their proper amount (*see, Litman v Litman*, 61 NY2d 918, *supra*).

Accordingly, in view of our holding that plaintiff's license to practice medicine is marital property, the order of the Appellate Division should be modified, with costs to defendant, by reinstating the judgment and the case remitted to the Appellate Division for determination of the facts, including the exercise of that court's discretion (CPLR 5613), and, as so [*591] modified, affirmed. Question certified answered in the negative.

Concur by: MEYER; TITONE

Concur

Meyer, J. (concurring). I concur in Judge Simons' opinion but write separately to point up for consideration by the Legislature the potential for unfairness involved in distributive awards based upon a license of a professional still in training.

An equity court normally has power to "change its decrees where there has been a change of circumstances" (*People v Scanlon*, 11 NY2d 459, 462, *on second appeal* 13 NY2d 982). The implication of Domestic Relations Law § 236 (B) [****34] (9) (b), which deals with modification of an order or decree as to maintenance or child support, is, however, that a distributive award pursuant to section 236 (B) (5) (e), once made, is not subject to change. Yet a professional in training who is not finally committed to a career choice when the distributive award is made may be locked into a particular kind of practice simply because the monetary obligations imposed by the distributive award made on the basis of the trial judge's conclusion (prophecy may be a better word) as to what the career choice will be leaves him or her no alternative.

The present case points up the problem. A medical license is but a step toward the practice ultimately engaged in by its holder, which follows after internship, residency and, for particular specialties, board certification. Here it is undisputed that plaintiff was in a residency for general surgery at the time of the trial, but had the previous year done a residency in internal medicine. Defendant's expert based his opinion on the difference between the average income of a general surgeon and that of a college graduate of plaintiff's age and life expectancy, which the trial judge

utilized, [****35] impliedly finding that plaintiff would engage in a surgical practice despite plaintiff's testimony that he was dissatisfied with the general surgery program he was in and was attempting to return to the internal medicine training he had been in the previous year. The trial judge had the right, of course, to discredit that testimony, but the point is that equitable distribution was not intended to permit a judge to make a career decision for a licensed spouse still in training. Yet the degree of speculation involved in the award made is emphasized by the testimony of the expert on which it was based. Asked whether his assumptions and calculations were in any way speculative, he replied: "Yes. They're speculative to the extent of, will Dr. O'Brien [*592] practice medicine? Will Dr. O'Brien earn more or less than the average surgeon earns? Will Dr. O'Brien live to age sixty-five? Will Dr. O'Brien have a heart attack or will he be injured in an automobile accident? Will he be disabled? I mean, there is a degree of speculation. That speculative aspect is no more to be taken into account, cannot be taken into account, and it's a question, again, Mr. Emanuelli, not for the expert [****36] but for the courts to decide. It's not my function nor could it be."

The equitable distribution provisions of the Domestic Relations Law were intended to provide flexibility so that equity could be done. But if the assumption as to career choice on which a distributive award payable over a number of years is based turns out not to be the fact (as, for example, should a general surgery trainee accidentally lose the use of his hand), it should be possible for the court to revise the distributive award to conform to the fact. And [**721] [***752] there will be no unfairness in so doing if either spouse can seek reconsideration, for the licensed spouse is more likely to seek reconsideration based on real, rather than imagined, cause if he or she knows that the nonlicensed spouse can seek not only reinstatement of the original award, but counsel fees in addition, should the purported circumstance on which a change is made turn out to have been feigned or to be illusory.

Titone, J. (concurring). I join in the majority opinion by Judge Simons for the court, and, like Justice Jackson, forthrightly surrender my contrary views in *Conner v Conner* (97 AD2d 88, 105 [Titone, J. [****37] P., concurring]) to a more cogent position (*McGrath v Kristensen*, 340 U.S. 162, 178 [Jackson, J., concurring]).

Marcus v. Marcus

Supreme Court of New York, Appellate Division, Second Department

May 26, 1988

No Number in Original

Reporter

137 A.D.2d 131 *; 1988 N.Y. App. Div. LEXIS 8437 *

Judges: Mollen, P. J. Thompson, Bracken and Brown, JJ., concur.

Opinion by: MOLLEN

Opinion

The instant appeal and cross appeal present several challenges to the trial court's resolution of the equitable distribution of the marital assets of the plaintiff wife and the defendant husband, including the trial court's categorization, valuation and ultimate distribution of those assets. Since the portions of the judgment which have been appealed from do not affect Elizabeth Atwood Metz, her appeal is dismissed on the ground that she is not aggrieved thereby (*see*, CPLR 5511). For the reasons that follow, we modify the judgment from which the parties appeal.

The record reveals that immediately following their marriage in Chicago in 1948, the plaintiff was employed as a fulltime social worker and contributed her earnings to the marital household while the defendant husband (hereinafter the defendant) attended medical school. The defendant graduated in 1950 and eventually built up a successful private psychiatric practice in New York. He also became an avid and knowledgeable investor and acquired many lucrative investments. The plaintiff ceased working in 1951 following the birth of the first of their three children, and thereafter devoted herself to [**10] taking care of the children, maintaining the household, and socially entertaining the defendant's business associates and colleagues. The plaintiff engaged in part-time employment infrequently during the marriage and at the time of trial was studying to obtain a certificate in psychoanalytic therapy.

The marital relationship began to deteriorate in the late [*135] 1970's, when the defendant and a former patient began to see each other socially and subsequently developed an intimate relationship. On July 18, 1980, the day preceding the effective date of equitable distribution in New York, while still living in the marital residence with the plaintiff, the defendant commenced an action for

divorce by service of a summons. That action, however, was dismissed in October 1980 for failure to serve a complaint. The defendant suffered a heart attack in September 1980 and returned to the marital residence and to the care of the plaintiff following his release from the hospital, but continued the extramarital relationship with his former patient. He also continued to practice psychiatry on an allegedly reduced schedule, although his earnings from his practice steadily increased. The [**11] marital problems continued, and the plaintiff commenced the present divorce action on January 8, 1982. After a lengthy trial in the Supreme Court, Westchester County, the court granted a divorce to the plaintiff and distributed the marital assets. This distribution forms the basis for the appeal and cross appeal from stated portions of the judgment of divorce.

In the first instance, both parties challenge the propriety of the trial court's over-all distribution of the marital assets. Under the facts of this case, we find the distribution to be appropriate. It is well settled that the Equitable Distribution Law contemplates -- precisely as denoted -- an equitable distribution of the marital property (*see, Kobylack v Kobylack*, 111 AD2d 221; *Sementilli v Sementilli*, 102 AD2d 78; *Ackley v Ackley*, 100 AD2d 153, *lv dismissed* 63 NY2d 605, 772). The record demonstrates that while the defendant is responsible for the major share of economic contributions to the marriage, the plaintiff's comparatively small financial contributions were significant because they were made early in the marriage and helped enable [**12] the defendant to pursue a medical education and career. Moreover, her noneconomic contributions as a full-time parent, spouse and homemaker were also substantial throughout the parties' lengthy marriage. Hence, in view of their respective contributions to the lengthy marital partnership, we discern no error in

the over-all percentage distributions by the court (*see*, Domestic Relations Law § 236 [B] [5] [d] [6]; *see generally*, *Neumark v Neumark*, 120 AD2d 502, *lv dismissed* 69 NY2d 899; *Griffin v Griffin*, 115 AD2d 587).

The defendant also argues that the trial court erred in failing to treat the date upon which he commenced his divorce [*136] action (i.e., July 18, 1980) as the cut-off date for identifying and classifying the parties' assets for purposes of equitable distribution as opposed to the date of the commencement of the instant action which was utilized by the trial court. In support of his position, the defendant relies upon a literal reading of Domestic Relations Law § 236 (B) (1) (c) which defines the term "marital property" as "all property acquired by either or both spouses during the marriage and before [**13] the * * * commencement of a matrimonial action" (emphasis supplied). The defendant therefore claims that his interest in his residence at Wilmot Road in New Rochelle, his half interest in a Manhattan cooperative office and an investment account at Sanford C. Bernstein & Co., all of which he acquired subsequent to the commencement of the first action, should have been deemed separate property not subject to equitable distribution. We disagree.

The defendant admitted at trial that he served a summons on the plaintiff on July 18, 1980, solely for the purpose of avoiding the application of the Equitable Distribution Law which became effective the following day, July 19, 1980 (Domestic Relations Law § 236). However, the defendant failed to serve a complaint in that action despite having ample opportunity to do so, and he did not seek to vacate or appeal from the order dismissing his action. Most significantly, however, the commencement of the first action did not signal the end of the parties' marital relationship; rather, the defendant continued to reside with the plaintiff and accepted the care of the plaintiff and the benefits of their marital relationship until 1982 when the [**14] plaintiff commenced the instant action (*cf.*, *Lennon v Lennon*, 124 AD2d 788; *Muller v Muller*, 116 Misc 2d 660; *Seldon v Seldon*, NYLJ, June 21, 1984, at 11, col 2; *but see*, *Wegman v Wegman*, 129 Misc 2d 968, *mod* 123 AD2d 220, *remittitur amended* 123 AD2d 238). In view of these facts, we conclude that to utilize July 18, 1980, as the cut-off date for the acquisition of marital property would be contrary to the fundamental policy underlying the Equitable Distribution Law. Such a result would permit a party to commence a baseless matrimonial action for the purpose of cutting off his or her spouse's right to a share in subsequently obtained property which would otherwise constitute marital property, while at the same time receiving the benefits of the parties' ongoing marital relationship.

In any event, even if we were to accept the defendant's

interpretation of the statute, the defendant's New Rochelle [*137] residence, his one-half interest in an office cooperative and his investment portfolio would still be deemed marital property since the record clearly demonstrates that these [**15] assets were acquired with funds received from the liquidation of his interest in a limited partnership, which partnership was acquired during the marriage and prior to the commencement of the defendant's action. Accordingly, these assets constituted marital property as they were acquired through the sale or exchange of marital property (*cf.*, *Lennon v Lennon*, *supra*, at 790).

Similarly unavailing is the defendant's argument that the trial court erred in classifying as marital property an account receivable which resulted from a purported loan made by him during the instant litigation to a trust fund for the parties' daughter. The record clearly demonstrates that the moneys loaned by the defendant had their source in income generated by investments he acquired during the parties' marriage and prior to the date the instant action was commenced. The defendant failed to produce any evidence at trial to establish that the income which was utilized to make the loan to the trust account was from earnings after the commencement of the instant action. Hence, the trial court was clearly entitled to conclude that the disputed funds arose from some or all of the investments [**16] acquired by the defendant during the parties' marriage and that those investments as well as their earnings constituted marital property (*see*, *Price v Price*, 69 NY2d 8; *Nolan v Nolan*, 107 AD2d 190).

Additionally, for the reasons previously stated, we find unpersuasive the defendant's contention that the valuation date for the marital assets should have been July 18, 1980, the date when the defendant's aborted action was commenced (*cf.*, *Matter of Ward v Ward*, 94 AD2d 908). The trial court's use of the date of trial (i.e., Feb. 1985) in valuing the majority of the marital assets was proper as most of the assets appreciated significantly during the three-year hiatus between the commencement of the instant action and the trial, as the result of market influences (*see*, *Wegman v Wegman*, *supra*, 123 AD2d, at 234-236). Recognizing that "the [valuation] date chosen must be tailored to the particular facts involved in each case and must be reflective of the legislative mandate to provide for the equitable distribution of the assets of the marital partnership" (*Wegman v Wegman*, *supra*, at 236), [**17] we perceive no basis for disturbing the values assigned to most of the assets by the trial court.

[*138] While we conclude that the lump-sum award to the plaintiff of 50% of the value of the defendant's retirement plan trust is supported by the record, we find that the trial court erred in valuing this asset as of the date

of distribution. The retirement fund, being in the nature of a pension plan, constitutes marital property only to the extent that the corpus of the retirement fund accumulates during the marriage and prior to the commencement of the divorce action (*see*, Domestic Relations Law § 236 [B] [1] [c]; *Majauskas v Majauskas*, 61 NY2d 481; *Damiano v Damiano*, 94 AD2d 132). In awarding the plaintiff a share in the plan's value as of the date of distribution, the court improperly distributed contributions to the trust which were made after the date of the commencement of the instant matrimonial action and which therefore constituted separate rather than marital property. The record demonstrates that the value of the trust as of January 15, 1982, one week after the commencement of the instant action, was \$ 760,065. Hence, the plaintiff [**18] is entitled to 50% of this amount, or \$ 380,032.50, and the judgment has been modified accordingly (*see generally*, *Neumark v Neumark*, *supra*; *Kobylack v Kobylack*, *supra*).

Additionally, the evidence does not support the trial court's valuation of the defendant's professional corporation at \$ 88,900. Although there was a paucity of proof on this issue, the record indicates that some assets held by the corporation were not considered in calculating its value and certain corporate liabilities alleged by the defendant were of dubious validity. In light of these facts, we conclude that the matter should be remitted to the trial court and should be reviewed as part of a hearing to determine the value and the proper distribution of the defendant's professional medical practice. That valuation should include, *inter alia*, an analysis of the tangible assets, earnings, goodwill and liabilities of the professional practice and the plaintiff's economic and noneconomic contributions thereto (*see generally*, *Arvantides v Arvantides*, 64 NY2d 1033). On this point, we note that the trial court erred in denying the plaintiff's posttrial application [**19] which sought, *inter alia*, to reopen the trial to permit the plaintiff to present evidence regarding the value of the defendant's license and psychiatric practice and to award her a portion of the value thereof. During the trial, the plaintiff limited her evidence regarding the defendant's professional practice to an analysis of the assets and liabilities of the practice. At one point during his cross-examination of one of the defendant's [*139] valuation experts, the plaintiff's counsel asked several questions concerning the defendant's earning capacity and the value of his license. The court, however, sustained defense counsel's objections to this questioning and refused to permit further inquiry along this line. Subsequent to the conclusion of the trial herein, the Court of Appeals rendered its decision in *O'Brien v O'Brien* (66 NY2d 576) and on the basis of that decision, the plaintiff moved to reopen the trial to permit her to adduce evidence regarding the value of the defendant's professional license

and practice in view of *O'Brien v O'Brien (supra)*. Clearly, the plaintiff is entitled to an equitable share of the defendant's practice [**20] and thus, her application for a further hearing on this issue should have been granted in order to insure a truly equitable distribution of marital assets between the parties (*see, Arvantides v Arvantides, supra; Litman v Litman*, 61 NY2d 918; *De Stefano v De Stefano*, 119 AD2d 793; *Sweeney v Sweeney*, 118 AD2d 774).

We note further, however, that, under the circumstances of this case, the plaintiff is not entitled to two separate awards for the defendant's license and psychiatric practice. In *O'Brien v O'Brien (supra)*, the Court of Appeals determined that a medical license was marital property subject to equitable distribution. Significantly, however, in *O'Brien v O'Brien (supra)*, the defendant husband, a surgical resident, had only recently acquired his medical license and he had not yet engaged in private practice. Clearly in that case the plaintiff wife was entitled to a distributive award representing her share in the value of the medical license. The case at bar presents a different scenario in that the defendant obtained his medical license in 1950, during the [**21] early years of the parties' marriage, and he subsequently developed his psychiatric practice over a period of approximately 30 years. The psychiatric practice was an ongoing and viable enterprise at the time the present action was commenced. Certainly in this situation, unlike *O'Brien v O'Brien (supra)*, the medical license should be deemed to have merged with and been subsumed by the practice itself. Thus, if the plaintiff were to receive separate awards representing her share in the value of the defendant's license and medical practice, a double recovery might well result (*see, Vanasco v Vanasco*, 132 Misc 2d 227; Scheinkman, Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law C236B:6, at 203). Accordingly, upon remittitur, we direct that the hearing court, in reaching a determination as to the plaintiff's appropriate [*140] share in the value of the defendant's license and psychiatric practice, shall value the practice as a single asset and render one distributive award therefor to the plaintiff.

In reaching the foregoing result, we note that in some cases it would be appropriate to conclude that a spouse's [**22] license and practice have not merged thereby permitting the other spouse to receive an award for his or her share of the license. For example, if the licensed spouse's practice was newly established and had not yet developed to its full potential at the time of valuation, the license should be regarded as a separate asset apart from the practice (*see, Maloney v Maloney*, NYLJ, Apr. 15, 1986, at 16, col 3, *affd* 137 AD2d 666; *see also, Cronin v Cronin*, 131 Misc

2d 879). This same result would be appropriate in a situation in which a licensed professional chooses to sell his or her ongoing successful practice, move to another location, and at the time of the commencement of the divorce action, intends to open or has recently opened another practice on a full-or part-time basis. In that case, unlike instances in which the licensed spouse has completely retired, the license has reemerged as a significant and valuable asset similar to the factual situation in *O'Brien v O'Brien* (66 NY2d 576, *supra*) and thus the other spouse should be entitled to share in the value of the license.

We have considered the remaining contentions [**23] of the parties and find them to be without merit.

Ordered that the appeal by the defendant Elizabeth Atwood Metz is dismissed, without costs or disbursements (*see*, CPLR 5511); and it is further,

Ordered that the judgment is modified, on the law and the facts, by (1) deleting subdivision 1 of the fifth decretal paragraph thereof and substituting therefor a provision

awarding the plaintiff \$ 380,032.50, said sum representing an amount equal to 50% of the trust holdings of the Harold Marcus, M.D., P. C. Retirement Plan Trust as of the date of the commencement of this action; and (2) deleting from subdivision 2 of the fifth decretal paragraph thereof the words "the interest standing in defendant Harold Marcus' name in Harold Marcus, M.D., P.C."; as so modified, the judgment is affirmed insofar as appealed from by the defendant husband and cross-appealed from by the plaintiff, without costs or disbursements, and the matter is remitted to the Supreme Court, Westchester County, for a hearing to determine the [*141] value and the equitable distribution of the defendant husband's psychiatric practice, which determination shall include a new valuation of the defendant husband's professional [**24] corporation; and it is further,

Ordered that the appeal from the order entered April 15, 1986, is dismissed as academic, without costs or disbursements, in light of our determination on the appeal from the judgment.

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McGowan v. McGowan

Supreme Court of New York, Appellate Division, Second Department

December 30, 1988

No Number in Original

Reporter

142 A.D.2d 355 *; 535 N.Y.S.2d 990 **; 1988 N.Y. App. Div. LEXIS 13885 **

Judges: Bracken, J. P. Rubin and Kooper, JJ., concur with Bracken, J. P.; Weinstein, J., concurs in part and dissents in part in an opinion.

Opinion by: BRACKEN

Opinion

It is now settled that where, during a marriage, one spouse begins and completes a medical education, the professional license which is conferred in recognition of the completion of that education qualifies as marital property which is subject to equitable distribution pursuant to Domestic Relations Law § 236 (B) (5) (*O'Brien v O'Brien*, 66 NY2d 576). In the present case, two questions have arisen, both of which require determination of the scope of the rule of the *O'Brien* case. First, it is necessary to decide whether a teaching certificate, conferred during the parties' marriage but as the result of an educational program which had been completed prior to the marriage, may constitute marital property. Second, we must decide whether an academic degree may, for the purposes of equitable distribution, be considered analogous to a professional license.

Any difficulty that may be thought to exist in deciding these issues is markedly diminished by considering that the rationale espoused by the *O'Brien* court is essentially founded upon the concept that a professional license is a thing of value mainly, if not solely, because of the "enhanced [***5] earning capacity [*357] it affords the holder" (*O'Brien v O'Brien, supra*, at 588). Since an academic degree may, under various circumstances, similarly enhance the earning potential of its holder, we see no valid basis upon which to distinguish such degrees from the professional licenses which pursuant to *O'Brien* are subject to equitable distribution. Also, considering that the enhancement of one spouse's earning capacity is the thing of value subject to equitable distribution pursuant to the *O'Brien* case, we conclude that such enhancement of earning capacity is acquired when it is actually achieved, that is, when the work that gave rise to it is finally completed, not at some later point when the completion of that work is formally recognized by the conferral of a degree or license.

We therefore hold that the teaching certificate conferred upon the plaintiff wife in the present case, which reflects certain achievements which she had attained before her marriage to the defendant, is not marital property. We also hold that the Masters degree which was subsequently conferred upon her is marital property, since it reflects the successful completion of [***6] a course of study undertaken during the marriage.

I

The plaintiff wife graduated from LeMoyne College in 1961. Between June 1961 and August 1963, she completed certain graduate work at the State University of New York in Oswego. Completion of this course of graduate study enabled her to obtain permanent certification as a teacher. The parties were married in August 1963.

In 1977 the plaintiff wife obtained a Master's degree. This entitled her to a higher salary in her position as a teacher.

[**992] In the present action for divorce, the defendant husband moved, *inter alia*, for an order "determining that the teaching license acquired by the plaintiff is marital property". This request for relief was based upon the defendant's mistaken belief that the plaintiff had not obtained permanent teaching certification until 1977. The defendant husband also sought an order vacating a prior payroll deduction order which had been issued against him and canceling his own pendente lite maintenance obligations, as well as an order directing the plaintiff wife to pay him \$ 75 per week as pendente lite maintenance. The extent of the marital property held by the plaintiff wife

is, of course, a factor [***7] that relates to the maintenance or [*358] temporary maintenance that should be awarded the defendant husband (*see*, Domestic Relations Law § 236 [B] [6] [a] [1]).

The plaintiff wife opposed this motion, and stated, *inter alia*, that "my education towards obtaining the permanent [teaching] certification was completed before my marriage to the defendant and, even though the permanent certification was issued approximately two weeks after the marriage ceremony, the defendant had nothing whatsoever to do with my obtaining the education necessary for the permanent certification". This assertion is not contradicted anywhere in the record.

The Supreme Court, in a decision dated July 15, 1987, held that "a teacher's certification [may be] a marital asset subject to equitable distribution" (136 Misc 2d 225, 228). It is not altogether clear that the court decided whether the teaching certificate at issue in this particular case constituted marital property, that is, a thing of value acquired during the parties' marriage. The Supreme Court also determined that the Master's degree obtained by the plaintiff in 1977 constituted marital property. These determinations [***8] were incorporated in an order, also dated July 15, 1987, from which the plaintiff wife has taken this appeal.

II

The Master's degree obtained by the plaintiff wife in 1977, after the completion of studies which took place during the course of the parties' marriage, is, in our opinion, marital property. We therefore affirm the conclusion reached by the Supreme Court in this respect.

The central theme of *O'Brien v O'Brien* (66 NY2d 576, *supra*), is that a professional degree may constitute a marital asset because it reflects the enhancement of the future earning potential obtained by one spouse as a result of years of education completed only with the assistance and support of the other spouse. This is a recurrent theme throughout the *O'Brien* opinion, in which it is stated, for example, that "[a] professional license is a valuable property right, reflected in the * * * enhanced earning capacity it affords its holder" (*O'Brien v O'Brien, supra*, at 586), and that the license's "value is the enhanced earning capacity it affords the holder" (*O'Brien v O'Brien, supra*, at 588). The monetary value of the license is to be [***9] determined by calculating the present value of the enhancement of the future earning potential of the holder of the license (*O'Brien v O'Brien, supra*; *see also, Matsuo v [*359] Matsuo*, 124 AD2d 864, 865; *Raff v Raff*, 120

AD2d 507, 508-509).*

[***10] [***993] We recognize that it is possible to identify certain distinctions between licenses and academic degrees. Generally, an advanced academic degree signifies that its recipient has become proficient in some scientific, artistic, or scholastic discipline, but such an advanced degree does not necessarily confer the legal right to engage in a particular profession. The completion of law school, for example, will be reflected by the granting of an academic degree which, as many recent graduates of law school realize all too well, does not carry with it the right to engage in any profession.

It is clear from a review of the *O'Brien* opinion, however, that the status of the professional license as a marital asset in that case did not depend on the fact that it entitled its holder to practice any particular profession. Rather, the critical factor was the existence of proof, in the form of expert testimony, that the license had a discernible monetary value because it enhanced substantially the future earning capacity of the holder. It is evident that in many circumstances an academic degree may also have such value. In the present case, in fact, the plaintiff wife forthrightly admits [***11] that her earning capacity increased as the result of her having obtained the Master's degree. It makes little sense to construe the Domestic Relations Law in such a way as to exempt from equitable distribution an MBA from the Harvard School of Business, which in real terms could be worth hundreds of thousands of dollars, and yet to subject to equitable distribution

*For example, where, as in *O'Brien*, the husband's highest educational attainment before marriage was a college degree and he acquired a medical license during the marriage and shortly before the divorce, the value of the license as an asset is measured by, (1) calculating the difference between the average total lifetime income that a college graduate could expect and the average total lifetime income that a physician could expect, and (2) reducing that amount to a present value (*see, e.g., O'Brien v O'Brien*, 66 NY2d 576, 582; 2 McCahey, Valuation & Distribution of Marital Property § 30.03 [3], at 30-19 -- 30-21). It should be noted that once the "student-spouse" embarks on his career and develops a history of *actual* earnings, the methodology outlined above should be discarded and the projections of future earnings should be based on actual past earnings produced by actual practice. In other words, the value of the degree or license merges into the value of the subject's professional or business practice (*see, e.g., Marcus v Marcus*, 137 AD2d 131; *Korman v Korman*, NYLJ, Sept. 16, 1986, at 13, col 4 [Sup Ct, Kings County, Rigler, J.]; *Vanasco v Vanasco*, 132 Misc 2d 227; *cf., Cronin v Cronin*, 131 Misc 2d 879; Jacobson, *O'Brien: Picking Our Way Through the Bramble Bush of Valuation*, 19 [No. 1] Fam L Rev 7 [Mar. 1987]).

[*360] a license to operate a junk yard (*see*, General Business Law § 60), upon the theory that the latter instrument, but not the former, entitles its holder to engage in a particular trade or profession.

None of the several arguments which were marshaled in opposition to the theory that a professional license may constitute marital property and which were rejected by the Court of Appeals in *O'Brien* (*supra*), are significantly more cogent when applied to a case involving an academic degree. One argument made in opposition to the recognition of professional licenses as marital property is based upon an anticipation of the practical difficulties which, it is foreseen, will plague the trial and intermediate appellate courts in their efforts to place a concrete monetary value on such licenses. A second argument [***12] focuses on the extremely unjust consequences which may result from an overestimation of the present monetary value of the enhancement of a matrimonial litigant's *potential* future earnings attributable to the knowledge, skill and ability signified by a professional license, particularly since such an overestimation of value will result in a substantial monetary judgment, which will be enforceable by all of the coercive procedures authorized by law, and which, unlike an order directing maintenance or child support, will not be subject to change (*see*, Domestic Relations Law § 236 [B] [9] [b]; *cf.*, Domestic Relations Law § 236 [B] [5] [e]; *O'Brien v O'Brien*, *supra*, at 591-592 [Meyer, J., concurring]; *Siegel v Siegel*, 132 AD2d 247, 254, *appeal dismissed* 71 NY2d 1021 [fluctuation of value of marital asset after divorce decree is entered does not warrant granting of postjudgment motion to modify property distribution]).

Both of these arguments were, however, soundly rejected in the *O'Brien* opinion and reconsideration of them now is not appropriate. What is important to note is that these arguments have no more persuasiveness [***13] with respect to the question of whether academic degrees should be recognized as marital property than they have with respect to the similar question involving professional licenses. The difficulties which may be encountered by the lower courts in placing a fair value on such a degree will not be measurably greater than [**994] those already encountered with respect to the valuation of licenses. The risk that undue hardship may result from the entry of judgments based upon overestimation of the value of degrees is certainly no greater than the similar risk which exists with respect to professional licenses.

[*361] Case law which has evolved in neighboring jurisdictions reveals that licenses and academic degrees are treated identically for the purposes of the distribution of a marital estate. We have found no example of an appellate court distinguishing between these two species of property

and treating one differently from the other. While this observation may be of somewhat limited importance since New York appears to be one of a very small minority of States whose matrimonial law has been interpreted as providing for the inclusion of licenses or degrees within the definition of marital [***14] property, it must be remembered that the classification of licenses or degrees as marital property is but one way in which to compensate a "working spouse" for his or her contributions to the future earning potential of the "student spouse". Several States have interpreted their matrimonial laws as providing for the compensation of the "working spouse" by mandating that any alimony or maintenance award, or any distributive award of property, must be increased so as to account for the future earning potential of the student spouse (*see, e.g., Nelson v Nelson*, 736 P2d 1145, 1147 [Alaska]; *Wisner v Wisner*, 129 Ariz 333, 631 P2d 115, 122; *In re Marriage of Graham*, 194 Colo 429, 574 P2d 75, 78; *In re Marriage of Weinstein*, 128 Ill App 3d 234, 470 NE2d 551, 559-560; *In re Marriage of Horstmann*, 263 NW2d 885, 891 [Iowa]; *Drapek v Drapek*, 399 Mass 240, 503 NE2d 946, 949; *Stevens v Stevens*, 23 Ohio St 3d 115, 492 NE2d 131, 134; *Petersen v Petersen*, 737 P2d 237, 241-242 [Utah]; [***15] *DeWitt v DeWitt*, 98 Wis 2d 44, 296 NW2d 761, 769). Other courts have held that the matrimonial law of their State requires "reimbursement alimony", that is, an award of maintenance approximating the value of the "working spouse's" contributions to the "student spouse's" education (*e.g., Mahoney v Mahoney*, 91 NJ 488, 453 A2d 527, 534-535). None of these cases suggests that the "working spouse's" entitlement to compensation ought to depend on the fact that it was a license, rather than merely an academic degree, which the "student spouse" obtained. Several cases squarely hold to the contrary that one spouse is entitled to some form of equitable reimbursement in return for having contributed to the other spouse's attainment of an advanced academic degree (*e.g., Grosskopf v Grosskopf*, 677 P2d 814, 822 [Wyo] [advanced degree in accounting]; *Mahoney v Mahoney*, *supra* [M.B.A. degree from Wharton School of Business]; *In re Marriage of Graham*, *supra* [B.S. degree in engineering physics, M.B.A. from University of Colorado]; *In re Marriage of Olar*, [*362] 747 P2d 676 [***16] [Colo] [doctoral degree in physiology and biophysics]; *Hughes v Hughes*, 438 So 2d 146 [Fla] [B.S. degree]).

There is, in short, no legal precedent for the drawing of a distinction between academic degrees and professional licenses in connection with their status as marital property, and any such distinction would seem to us to be wholly arbitrary. We therefore conclude that the court properly held that the plaintiff wife's Master's degree is marital property.

III

The next issue for consideration is whether the plaintiff wife's teaching certificate, awarded approximately two weeks after the marriage ceremony, also constitutes marital property. In light of the uncontradicted evidence in the record that the plaintiff had completed the requirements for that degree before the parties' marriage, we conclude that it is not.

The husband's argument in this regard is based upon a simplistic reading of the *O'Brien* case. The defendant husband's position is that, since the plaintiff's teaching certificate was acquired during the marriage, all of the enhancement of earning potential that it represents must also be deemed to have been acquired during the marriage. This, [***17] however, is obviously [**995] not the case. The real thing of value, that is, the plaintiff's increased skill, knowledge and ability, her "human capital", as it were, was acquired before the marriage and must therefore be deemed separate property.

As previously discussed, the consideration of a license or degree as marital property represents but one of several methods by which the courts throughout the United States have sought to remedy a single social injustice, i.e., the injustice that results when one spouse, to the detriment of his or her own fulfillment, labors in order to support the other spouse through an educational program, only to be divorced before the economic rewards of that program are realized. Virtually every appellate decision which has been written on issues such as those presented here recognizes that the so-called "student-spouse, working-spouse" syndrome is the basic underlying problem to which a just solution is sought (*see, O'Brien v O'Brien*, 106 AD2d 223, 231, *mod* 66 NY2d 576, *supra*; *Conner v Conner*, 97 AD2d 88, 106-107 [Bracken and Brown, JJ., concurring]). The debate concerns itself only with the [***18] issue of whether the cure for this "syndrome" may be worse than the syndrome itself. It has been unanimously [*363] decided by the Court of Appeals that with respect to professional licenses such a cure is not. It would certainly amount to a gross injustice, however, to consider a license or degree to be property, where the symptoms of the "student-spouse, working-spouse syndrome" are completely absent.

To apply the rule of the *O'Brien* case where the parties are married *after* one spouse has already completed his or her education, but before the degree referable to that education has been conferred, would do nothing to remedy the social inequity previously alluded to and would merely result in the unjust enrichment of one party. The language of the *O'Brien* decision itself mandates this conclusion. The court in *O'Brien* held that "marital property

encompasses a license to practice medicine *to the extent that the license is acquired during marriage*" (*O'Brien v O'Brien*, 66 NY2d 576, 584, *supra* [emphasis added]). Such language clearly implies that the valuable enhancement of a party's future earning potential is not something that is acquired [***19] instantly upon the receipt of a degree or license; rather, it is something which is acquired gradually through days, months or years of study. It would, in our view, be illogical and manifestly unjust to hold, for example, in the case of a man or woman whose marriage takes place *after* he or she has gone through several years of college, several years of medical school and several years of hospital internship and residency, but one day *before* his or her license to practice medicine is finally conferred, that the other spouse would, in the event of a subsequent divorce, be entitled to share in the full value of that license. In order to constitute marital property, a degree or license must be attributable to a course of study, at least part of which was undertaken during the marriage. The license or degree will constitute marital property only to the extent that it is attributable to the work done during the marriage.

For these reasons, we conclude that the teaching certification earned by the plaintiff wife in 1963 is not marital property.

IV

Accordingly the order appealed from is modified by deleting the provision thereof granting that branch of the defendant's motion which [***20] was to determine that the plaintiff's teaching certificate constitutes marital property and substituting therefor a provision denying that branch of the motion; as so modified, the order is affirmed insofar as appealed [**996] from.

Concur by: WEINSTEIN (In Part)

Dissent by: WEINSTEIN (In Part)

Dissent

[*364] Weinstein, J. (concurring in part and dissenting in part).

It is my position that the trial court erroneously extended the holding of the Court of Appeals in *O'Brien v O'Brien* (66 NY2d 576, *on remittitur* 124 AD2d 575) to the facts of this case in order to encompass both the plaintiff wife's teacher's certification and the Master's degree in Science in Reading which she acquired from C.W. Post College in 1977. As per my view of the *O'Brien* decision, a

professional license may be found to constitute marital property subject to equitable distribution under appropriate conditions. Those conditions, which include acquisition of the license during the parties' marriage and direct or indirect contributions by the non-title-holding spouse, do not prevail in the instant case. Nor is a professional license in the sense contemplated by the Court of Appeals in *O'Brien*, i.e., [***21] a medical degree with its attendant enhanced earning capacity, at issue here. Accordingly, the extension of *O'Brien* to the instant scenario is unsupportable.

In the course of the *O'Brien* decision, the Court of Appeals stated the following: "The words mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the non-title-holding spouse, including financial contributions and nonfinancial contributions made by caring for the home and family" (*O'Brien v O'Brien*, *supra*, 66 NY2d, at 584). The Court of Appeals clearly did not intend to classify every educational achievement obtained by one of the spouses of the failed marriage as property to which the other spouse might assert a claim on the ground that the other spouse contributed in some way to the educational attainment at issue and thereby contributed to the "profession or professional career potential" of the recipient spouse. In the language of the Court of Appeals, "[the] Legislature has decided, by its explicit reference in the statute to the contributions of one spouse to the other's [***22] profession or career (*see*, Domestic Relations Law § 236 [B] [5] [d] [6], [9]; [e]), that these contributions represent investments in the economic partnership of the marriage and that the product of the parties' joint efforts, the professional license, should be considered marital property" (*O'Brien v O'Brien*, *supra*, at 585-586). Unlike the situation in *O'Brien* in which the defendant wife worked continuously during the marriage and contributed all of her earnings to the couple's joint effort, to the extent of sacrificing her own educational and career opportunities and traveling with her husband to Mexico for 3 1/2 years while he attended [*365] medical school there (*O'Brien v O'Brien*, *supra*, at 585), the defendant in the instant case made no such vital contribution. The record reveals that he worked for a time in Arkansas and, subsequent to a period of unemployment, obtained a job with the United States Postal Service in Washington, D.C. While employed by the Postal Service, the defendant resided away from the family for a five-year interval. With the exception of occasions on which he visited home for the weekend, the defendant [***23] left the entire burden of caring for the children and maintaining the household to the plaintiff (*cf.*, *Capasso v Capasso*, 119 AD2d 268, 274). Moreover, although the plaintiff's permanent certification

as a teacher was obtained approximately two weeks after the parties' marriage ceremony, the educational prerequisites leading up to it were completed prior to the marriage. It cannot be gainsaid that the equities clearly favor the plaintiff wife in the instant case.

Domestic Relations Law § 236 (B) (5) (d) (6) directs courts, in determining an equitable disposition of property, to consider a spouse's "direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, [**997] wage earner and homemaker, and to the career or career potential of the other party". Included in such "direct or indirect [contributions]" are not only the spouse's own career sacrifices, but also his or her contributions in terms of income, the assumption of household responsibilities, the deprivation of marital assets which might otherwise have been acquired [***24] (*O'Brien v O'Brien*, *supra*) and emotional and moral support provided to the other spouse (*Price v Price*, 69 NY2d 8, 14). The record in the instant case provides no basis for concluding that the defendant has made any substantial contributions with regard to any of the aforementioned factors.

Readily distinguishable is this court's holding that a husband's enhanced earning capacity emanating from his registration as a physician's assistant constituted marital property subject to equitable distribution (*Morimando v Morimando*, AD2d [decided herewith]). In *Morimando*, the defendant wife was the sole wage earner while the plaintiff was enrolled full time in the physician's assistant program at the State University of New York at Stony Brook. Moreover, the record therein was replete with illustrations of economic and social sacrifices endured by the defendant on account of the plaintiff's schooling.

[*366] Given the fact that the educational prerequisites leading up to the plaintiff's permanent teacher's certificate were completed prior to the parties' marriage and absent any illustrations of economic and social sacrifices endured by the defendant [***25] in the instant case, I concur with the majority to the extent of concluding that the trial court erroneously labeled the plaintiff wife's teacher's certification marital property.

As the plaintiff has aptly noted, the defendant's motion papers did not include a request that the plaintiff's Master's degree as such be considered marital property subject to equitable distribution. The defendant was apparently under the mistaken belief that the teacher's certification was not obtained until 1977 when the plaintiff obtained her Master's degree. Consequently, the notice of motion merely demanded, with respect to this issue, an order "determining that the teaching license acquired by the

plaintiff Kathleen A. McGowan is marital property subject to equitable distribution". Accordingly, the order of the trial court effectively exceeded the scope of the defendant's demand. I note, in any event, that contrary to the conclusion reached by the majority, I am of the view that an academic degree, unlike a professional license, is not property susceptible of distribution pursuant to Domestic Relations Law § 236 (B) (*Conner v Conner*, 97 AD2d 88; *Cronin v Cronin*, 131 Misc 2d 879). [***26] Rather, I find nothing in *O'Brien* which overrules the *Conner* court's holding that "we may not indulge in the fiction that an academic degree can be evaluated as reified marital property" (*Conner v Conner*, *supra*, at 102). I note furthermore that I have no quarrel with the majority's categorization of the main theme of the *O'Brien* decision in the following terms: "that a professional degree may constitute a marital asset because it reflects the enhancement of the future earning potential obtained by

one spouse as a result of years of education completed only with the assistance and support of the other spouse" (majority opn, at 358). While the plaintiff wife's acquisition of a Master's degree may well result in the enhancement of her future earning potential, it can hardly be said that her education was completed only with the assistance and support of the other spouse. Accordingly, the plaintiff's Master's degree did not constitute marital property within the meaning of *O'Brien*.

In conclusion, I vote to reverse the order under review insofar as appealed from, and to deny that branch of the defendant's motion which was to determine that a teaching [***27] certificate constitutes marital property, and to delete the [*367] provision determining that the plaintiff's Master's degree constitutes marital property subject to equitable distribution.

End of Document

McSparron v. McSparron

Court of Appeals of New York

October 19, 1995, Argued ; December 7, 1995, Decided

No. 260

Reporter

87 N.Y.2d 275 *; 662 N.E.2d 745 **; 639 N.Y.S.2d 265 ***; 1995 N.Y. LEXIS 4451 ****

Judges: Chief Judge Kaye and Judges Simons, Bellacosa, Smith and Ciparick concur; Judge Levine taking no part.

Opinion by: TITONE

Opinion

In *O'Brien v O'Brien* (66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712), this Court [****747**] [*****267**] held that a professional license acquired two months before the commencement of the matrimonial action was marital property subject to equitable distribution under Domestic Relations Law § 236 (B). Since that decision, the courts of this State have struggled with the problems involved in distributing the value of older professional licenses that have been utilized in the development of their holders' careers. The primary question presented by this appeal is whether a license that has been exploited by the licensee to establish and maintain a career may be deemed to have "merged" with the career and thereby lost its character as a separate distributable asset.

The parties were married in 1969. At the time of their marriage, both parties had undergraduate college degrees and neither possessed any appreciable assets. Defendant husband attended law school during the first three years of [*****8**] the marriage, gaining admission to the Bar in 1973. He thereafter practiced law and was earning an annual salary of \$ 97,000 as a Deputy First Assistant Attorney-General when the parties separated in mid-1989.

Plaintiff wife acquired a master's degree in psychology during the early years of her marriage. Over the next 12 to 13 years, she worked as a school psychologist, taking time off occasionally to care for the couple's children or to attend graduate school. In 1984, plaintiff began attending medical school. She graduated in 1988 and, after completing a one-year internship, she received a license to practice medicine in July of 1989. Plaintiff commenced this matrimonial action on September 1, 1989, four months before the completion of her second internship.

[***280**] By a judgment of divorce dated October 1, 1991, the Supreme Court awarded each party custody of one of

the couple's two children. Defendant was ordered to pay child support and weekly maintenance and the marital property was divided equally between the parties. In determining the total value of the marital estate, the court included the value of each party's professional license as measured by the increased [******9**] earning capacity it represented: \$ 529,363 for defendant's law license and \$ 903,406 for plaintiff's medical license. The marital estate was then divided so that each party retained the value of his or her license and pension interest. The marital residence was to be sold and the proceeds distributed equally. The other marital assets, including vehicles, investments and vacation property were also distributed. Both parties then appealed from the portions of the judgment that they deemed objectionable.

The Appellate Division modified in several important respects. On defendant's appeal, the Court held that defendant's law license should not have been treated as separate marital property available for equitable distribution because it had "long since merged into [defendant's] professional career" and was not "an asset ... possess[ing] an independent identity for the purpose of computing appreciation" (190 A.D.2d 74, 81, quoting *Kalisch v Kalisch*, 184 A.D.2d 751, 752, 585 N.Y.S.2d 476). Several of plaintiff's arguments regarding the distribution of marital property were rejected, but the Court agreed with her contention that her medical license had been overvalued. [******10**] Based on these and other perceived problems in the divorce judgment, the Appellate Division reversed and remitted to the Supreme Court for a redistribution of the marital assets as well as for a modification of the conditions imposed in connection with defendant's visitation rights.

On the remand, Supreme Court redistributed the marital property in accordance with the Appellate Division's decision. The court also granted a defense motion to eliminate defendant's prospective maintenance because of his recent job loss. Defendant had applied for relief from his maintenance obligation during the pendency of the appeal to the Appellate Division after plaintiff had appeared at a press conference and accused him of engaging in criminal activity. The acknowledged purpose of this press conference was to embarrass defendant's

employer, the then-State Attorney-General, who was campaigning for a different office. As a result of these accusations, defendant was forced to resign from his position and had been unable to find new employment. The [**748] [***268] court found that defendant's [*281] job loss was not a self-imposed hardship and that, in view of plaintiff's current [****11] annual income, defendant should not be obliged to continue paying her maintenance. Plaintiff then took a second appeal.

On that appeal, the Appellate Division affirmed, rejecting plaintiff's contentions regarding the elimination of her maintenance and the purported one-sidedness of the redistribution of marital property. The Court also declined either to exclude plaintiff's medical license from the marital estate or to reconsider its earlier conclusion that defendant's law license was improperly included. Plaintiff took the present appeal by permission of this Court.

II

Initially, we reject plaintiff's arguments regarding the inclusion of her own medical license as an item of marital property available for equitable distribution. Contrary to plaintiff's contentions, nothing that has occurred in the 10 years since *O'Brien* was decided suggests a reason to overrule it. The "chaos" and "confusion" that plaintiff perceives are really nothing more than reflections of how difficult it is to achieve true fairness in the division of a married couple's tangible and intangible assets. Far from undermining *O'Brien*'s pragmatic and theoretical worth, the decade of case [****12] law history that plaintiff cites is an example of the kind of experimentation and creative problem solving that the Domestic Relations Law and equity itself demand.

Equally unpersuasive is plaintiff's contention that *O'Brien* should be limited to cases in which one spouse worked and supported the family financially while the other went to school and earned a professional license. Plaintiff's emphasis on the nontitled spouse's financial subsidy to the exclusion of all other forms of contribution represents an unacceptably narrow view of the economic partnership that characterizes the institution of marriage. Here, for example, although defendant apparently did not finance plaintiff's medical education, he was the primary provider of economic support to the family while plaintiff was in school. Additionally, he prepared family meals and tended to the children's needs so that plaintiff could devote her time to her studies and work. Thus, the evidence supports the affirmed finding below that defendant "contributed to the functioning of the household while plaintiff attended medical school." Under these circumstances, inclusion of plaintiff's license as an item of distributable [****13] marital property is appropriate [*282] to fulfill the core

purpose of the *O'Brien* rule: to assure the nontitled spouse an equitable share of the license to which that spouse's efforts contributed. Accordingly, there is no sound basis for withholding *O'Brien*'s application here. We note that, contrary to plaintiff's contentions, there is also record support for the Appellate Division's valuation of her medical license. Consequently, the lower courts' distribution of plaintiff's professional license will not be disturbed. *

[****14] III

We reach a different conclusion, however, with respect to the Appellate Division's disposition of defendant's professional license to practice law. As a threshold matter, we reject plaintiff's contention that the Appellate Division lacked the power to modify Supreme Court's decision to distribute the license's value because defendant did not specifically mention that aspect of the judgment in his notice of appeal. Contrary to plaintiff's contentions, the scope of the Appellate Division's review power was not limited by the recitations in defendant's notice of appeal. Notably, there is no indication on this record that plaintiff was prejudiced by any ambiguity or omission in the notice. Accordingly, there is no basis for this Court to interfere with the Appellate Division's discretionary choice to [**749] [***269] construe defendant's notice of appeal liberally or even to reach beyond the issues it cited.

Turning to the substantive question, we find considerable merit in plaintiff's contention that the Appellate Division erred in treating defendant's law license as having "merged" with defendant's career. The "merger" principle on which the Court's decision [****15] was based is derived from the Second Department's ruling in *Marcus v Marcus* 137 A.D.2d 131), in which it was held that a professional license should not be assigned an independent value where the licensee has maintained a professional practice for a substantial period. In that situation, the *Marcus* Court stated, the license "should be deemed to have merged with and been subsumed by the practice itself" (*id.*, at [*283] 139). The underlying rationale is that "the equitable considerations that ... motivated the

* Plaintiff has also argued that the bulk of the marital estate should have been awarded to her because a considerable portion of it was derived from gifts from plaintiff's parents. However, the courts below both found that the gifts in question were given with an intent to benefit the parties equally and were therefore properly included as marital property. This conclusion, as well as the Supreme Court's affirmed rulings with respect to defendant's maintenance obligation and the distribution of certain bonds, were supported by the record and thus there is no basis for this Court to intervene.

O'Brien court are fundamentally different" where the license has been utilized for a substantial period to establish a career or professional practice and to generate tangible assets for the family (*Parlow v Parlow*, 145 Misc. 2d 850, 856, 548 N.Y.S.2d 373; *see, Maher v Maher*, 196 A.D.2d 530, 531, 601 N.Y.S.2d 165).

In the years since the merger theory was first articulated, the lower courts of this State have applied it with varying results. While the theory has repeatedly been reaffirmed (*see, e.g., Duffey v Duffey*, 198 A.D.2d 581, 603 N.Y.S.2d 234; *Maier v Maier, supra*, at 531; *Kalisch v Kalisch, supra; McGowan v McGowan*, [****16] 142 A.D.2d 355, 359, 535 N.Y.S.2d 990, n; *Madori v Madori*, 151 Misc. 2d 737, 573 N.Y.S.2d 553, *affd* 201 AD2d 859, 608 N.Y.S.2d 331; *Vanasco v Vanasco*, 132 Misc. 2d 227, 503 N.Y.S.2d 480; *but see, Holihan v Holihan*, 159 A.D.2d 685, 553 N.Y.S.2d 434), the courts have also found it necessary to make significant modifications to address the myriad of situations in which the problem of matured professional licenses has arisen. In *Shoenfeld v Shoenfeld* (168 A.D.2d 674, 563 N.Y.S.2d 500), for example, the Second Department upheld the lower court's holding that a two-year-old practice was too new to have subsumed the underlying professional license. Similarly, in *Phelps v Phelps* (199 A.D.2d 608, 609, 604 N.Y.S.2d 339), the Third Department held that it was not error to assign separate distributable value to a medical license that had been in use for seven years because the licensee had made several changes in the form of his practice and his earnings had not yet "stabilized sufficiently to permit a valuation of his practice which would truly reflect the increased earning capacity [attributable to his] license." In *Aborn v Aborn* (196 A.D.2d 561, 601 N.Y.S.2d [****17] 339), the Second Department declined to apply the merger rule to a spouse's professional license where the licensee had dissolved what had once been a profitable professional partnership and had relocated his practice several times.

In yet another approach to the problems created by professional mobility, the lower courts have held that a license which has previously "merged" with a professional career or practice may "reemerge" as a significant and separately distributable asset if the licensed spouse experiences a significant career change. This principle was applied where the licensed spouse sold a long-standing medical practice and opened a new one in another State (*Behrens v Behrens*, 143 A.D.2d 617, 532 N.Y.S.2d 893; *cf., Marano v Marano*, 200 A.D.2d 718, 607 N.Y.S.2d 359) and where a spouse with a law license terminated his career as a United States Congressman shortly after the matrimonial action was commenced (*Martin v Martin*, [*284] 200 A.D.2d 304, 614 N.Y.S.2d 775). It was also applied, in combination with the *Shoenfeld-Phelps-Aborn*

exception, where a licensed attorney who had worked as a law assistant for 10 years switched to private practice and [****18] the four-year history of that practice did not "warrant the finding" that the practice had subsumed the license (*Wells v Wells*, 177 A.D.2d 779, 780, 576 N.Y.S.2d 390).

Yet another variant of the merger rule was applied by the Fourth Department in *Finocchio v Finocchio* (162 A.D.2d 1044, 556 N.Y.S.2d 1007) and *DiCaprio v DiCaprio* (162 A.D.2d 944, 556 N.Y.S.2d 1011). The Courts in those cases acknowledged the applicability of the merger principle but treated the enhanced earning power associated with a [**750] [***270] spouse's professional license as a marital asset anyway. Over a vigorous dissent, the *Finocchio* majority reasoned that the merger principle should not be applied "in a way which would deprive the nonlicensee spouse of ... any interest [in] the marital asset beyond commencement of the matrimonial action" (162 A.D.2d at 1045). Accordingly, while the spouse's professional license had "merged" into his career, that conclusion meant only that the method for valuing the license "must include a projection of the licensee's future earnings 'based on actual past earnings produced by actual practice' " (*id.*, at 1046, quoting *McGowan v McGowan*, [****19] *supra*, at 359, n; *accord, DiCaprio v DiCaprio, supra*, at 945). In other words, under *Finocchio* "the only effect of the merger is that the court uses the owner's actual earnings to compute the [license's] value instead of using the projected earnings of the average professional" (Turner, *Equitable Distribution of Property* § 6.19A, at 227 [1993 Cum Supp]).

Although the *Finocchio* approach has much merit, it is ultimately flawed because of its continued reference to the concept of "merger." As is evident from the case law, the use of that term injects an artificial and unnecessarily confusing element into an already difficult assessment process.

One objection to the concept of "merger" is that it rests on the notion that an unrevoked professional license can somehow lose its character as a component of marital property solely because of its use in advancing its holder's career. If, as we held in *O'Brien*, a currently valid professional license is a distributable item of economic value, it should logically retain that quality throughout its existence. It would be anomalous to suggest that a marital asset may "merge" or disappear and perhaps even "reemerge" or [****20] reappear depending on the vicissitudes of the licensee's professional career (*cf., Oldham, Divorce, Separation and Distribution of Property* § 9.02 [1], at [*285] 9-11 ["(i)t would be Alice-in-Wonderlandish to say that education is property only

sometimes"]).

A second objection to the "merger" theory is that it is difficult to apply. Even the doctrine's simplest application is problematic, since there can be no clear yardstick for measuring when the licensee's practice or career has matured to the point where it has "subsumed" the license (*see*, Scheinkman, Supplementary Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 236, C236B:6, at 40 [1995 Cum Ann Pocket Part]). The doctrine's proper use becomes even more confusing when it is applied to the many situations in which the licensee has experienced career reversals, has opted to change professional direction or has simply selected a career that does not "square up exactly" with the scope of the license (*id.*, at 40-41).

Finally and most fundamentally, the merger doctrine is flawed because its practical effect is to limit the *O'Brien* rule's application to recently acquired [****21] licenses (*see*, *DiCaprio v DiCaprio*, *supra*, at 946-948 [Lawton, J., dissenting]; *Marcus v Marcus*, *supra*, at 139). Such a narrow approach is inconsistent with the equitable goal of assuring both spouses a fair share of all of the assets that were produced by the marital partnership. Application of the merger doctrine is particularly inimical to the statutory purposes because it generally favors the nonlicensed spouse in a shorter marriage over the nonlicensed spouse who is faced with rebuilding his or her economic life after the breakup of a long-term marriage (*see*, Scheinkman, *op. cit.*, C236B:6, at 40 [1995 Cum Ann Pocket Part]).

In view of these logical and practical difficulties, we conclude that the letter and spirit of our holding in *O'Brien* is best served by eliminating the concept of "merger" from the inquiry. The merger doctrine should be discarded in favor of a commonsense approach that recognizes the ongoing independent vitality that a professional license may have and focuses solely on the problem of valuing that asset in a way that avoids duplicative awards. *O'Brien* permits the court to include in the marital estate the present value of [****22] any increased earning capacity attributable to a professional license earned during the marriage. That increased earning capacity continues to exist, to a [**751] [***271] greater or lesser degree, throughout the life of the license. Even after the licensee has had the time and opportunity to exploit the license and to realize a portion of the enhanced earning potential it affords, the license itself retains some residual economic value, although in particular cases it [*286] may be nominal (*see*, Turner, *op. cit.*, at 227-228). That value can be measured and distributed just as a newly acquired license is valued through various actuarial techniques that are well known to valuation experts.

To be sure, the valuation inquiry is made more complicated by the passage of time and the licensee's harvesting of some portion of the enhanced earning capacity that accompanies the license. The value of a newly earned license may be measured by simply comparing the average lifetime income of a college graduate and the average lifetime earnings of a person holding such a license and reducing the difference to its present value (*see*, *O'Brien v O'Brien*, *supra*, at 582; [****23] 2 McCahey, Valuation & Distribution of Marital Property § 30.03 [3], at 30-19--30-21). In contrast, where the licensee has already embarked on his or her career and has acquired a history of actual earnings, the foregoing theoretical valuation method must be discarded in favor of a more pragmatic and individualized analysis based on the particular licensee's remaining professional earning potential (*see*, *Finocchio v Finocchio*, *supra*, at 1045-1046; Scheinkman, *op. cit.*, C236B:6, at 48 [1995 Cum Ann Pocket Part]). Moreover, care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license such as the licensed spouse's professional practice. The courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.

The existence of these complications, however, is not a sound reason to introduce nettlesome legal fictions or to excise an asset to which the nontitled spouse has contributed from the marital estate. As we stated in *O'Brien*, the complexity of calculating [****24] the present value of a partially exploited professional license is no more difficult than the problem of computing wrongful death damages or the loss of earning potential that is occasioned by a particular injury (66 N.Y.2d at 588). Nor does it lead to significantly more speculation than is involved in the now-routine task of valuing a professional practice for the purpose of making a distributive award (*see*, *id.*, citing *Arvantides v Arvantides*, 64 N.Y.2d 1033, 489 N.Y.S.2d 58, 478 N.E.2d 199; *Litman v Litman*, 93 A.D.2d 695, 463 N.Y.S.2d 24, *aff'd* 61 N.Y.2d 918, 474 N.Y.S.2d 718, 463 N.E.2d 34; *see also*, *Burns v Burns*, 84 N.Y.2d 369, 376-377, 618 N.Y.S.2d 761, 643 N.E.2d 80).

IV

In this case, no distributive award representing the value of defendant's law license was made because of the Appellate [*287] Division's prior ruling that the license had merged with defendant's legal career. This ruling was error, since the license had a residual economic value independent of defendant's career. Accordingly, the matter must be remitted to the Supreme Court so that a new distribution of the marital assets taking into account the value of

defendant's law [****25] license, can be made. Notably, the question of valuation will probably have to be tried de novo, since it appears that the experts' assessments and the Supreme Court's initial valuation determination were made without compensating for the portion of the enhanced earning capacity attributable to the license that has already been realized through defendant's legal career (*see*, Turner, *op. cit.*, at 227-228). However, a full de novo inquiry into the other distributive issues is not necessary, since those issues have already been resolved in prior proceedings and, as noted elsewhere in this opinion, we find no basis to disturb their disposition in the courts below.

Inasmuch as there must be a new trial on this narrow point, we turn briefly to the question of whether the trial court may consider the postcommencement events that may have affected the value of defendant's license. Of course, the most significant of these is defendant's 1992 job loss, which was [**752] [****272] caused in part by what the Appellate Division characterized as plaintiff's " 'acrimonious and vindictive conduct' " (208 AD2d, at 837).

Domestic Relations Law § 236 (B) (1) (c) provides that the [****26] classification of property as "marital" or "separate" is governed by the date on which the matrimonial action was commenced or the parties' separation agreement executed. However, the equitable distribution statute does not specify the date that is to be used as the touchstone for measuring the value of the marital property (*see*, Scheinkman, *op. cit.*, C236B:26, at 287). Thus, the appropriate date for measuring the value of marital property has been left to the sound discretion of the trial courts, which should make their determinations with due regard for all of the relevant facts and circumstances (*see*, Domestic Relations Law § 236 [B] [4] [b]).

In attempting to select a suitable valuation date, some courts have drawn a distinction between "active" assets (i.e., those whose value depends on the labor of a spouse) and "passive assets" (i.e., those whose value depends only on market conditions). These courts have concluded that "active" assets should be valued only as of the date of the commencement of the action, while the valuation date for "passive" assets may be determined more flexibly (*see*, *Smerling v Smerling*, 177 A.D.2d 429, 576 N.Y.S.2d 271; [**288] [****27] *Heine v Heine*, 176 A.D.2d 77, 580 N.Y.S.2d 231; *Zelnik v Zelnik*, 169 A.D.2d 317, 573 N.Y.S.2d 261; *Kallins v Kallins*, 170 A.D.2d 436, 565 N.Y.S.2d 227; *Greenwald v Greenwald*, 164 A.D.2d 706, 565 N.Y.S.2d 494). Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law (*see generally*, Scheinkman, *op. cit.*, C236B:26, at 79-80 [1995 Cum Ann Pocket Part]).

Here, for example, defendant's law license would probably be classified as an "active" asset in the lower courts' taxonomy. Yet, one of the apparent goals of using the date of the action's commencement for measuring the assets' worth, i.e., preventing the licensed spouse from unilaterally manipulating the asset's value, may not be relevant in this case, where the actions of the nonlicensed spouse may have undermined the license's residual economic value.

In the final analysis, whether the unusual postcommencement events that led to defendant's job loss should be considered in assessing the residual value of his law license is a question that lies squarely within the trial court's discretion. [****28] We hold only that the timing of these events should not by itself be a legal impediment to such consideration.

Accordingly, the order of the Appellate Division should be modified, with costs to appellant, and the case remitted to Supreme Court for further proceedings in accordance with this opinion and, as so modified, affirmed.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith and Ciparick concur; Judge Levine taking no part.

Order modified, etc.

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